LAW LETTER

Your Key to the Issues

February 2014

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Your strategic partner at law

We welcome readers to this first edition of Law Letter in 2014, where we deal with the payment of interest, suretyships, confidentiality, insurance claims and the obligations of trade unions to their members. Please remember that the contents of Law Letter do not constitute legal advice. For specific professional assistance, always ensure that you consult your attorney. We welcome your comments and suggestions.

From our courts

Insurance Law

▪ *Use it or Lose it*

"Experience is not what happens to a man; it is what a man does with what happens to him."
– Aldous Huxley (1894 - 1963)

It is always a matter of concern when someone who owes you money goes insolvent. Legal proceedings are suspended and often unsecured creditors do not even receive a dividend once the insolvent estate of the debtor is wound up. However if the debtor is insured in respect of your claim, Section 156 of the **Insolvency Act** of 1936 is your solution. It provides:

> "Whenever any person (hereinafter called the insurer) is obliged to indemnify another person (hereinafter called the insured) in respect of any liability incurred by the insured towards a third party, the latter shall, on the sequestration of the estate of the insured, be entitled to recover from the insurer the amount of the insured's liability towards the third party but not exceeding the maximum amount for which the insurer has bound himself to indemnify the insured."

The Supreme Court of Appeal in Bloemfontein has confirmed that although Section 156 refers to "person", it also applies to the liquidation of companies.

In 2003 the Supreme Court of Appeal explained the advantages of Section 156 as follows:

> *"In the absence of the section the insured's creditor, upon the former's sequestration, would have to prove a claim in his insolvent estate and be content with whatever dividend is paid to the concurrent creditor, whilst the insured's rights under the policy would vest in his trustee, who would claim from the insurer for the benefit of the general body of creditors. The effect of the section, therefore, is that the creditor is granted the considerable advantage that he does not have to share the proceeds of the policy with other creditors. To that end he is given a direct right of action against the insurer."*

But the lucky creditor has to make sure that he does not delay unduly. In this case the insurer raised a plea of prescription, namely that the right to claim had expired in terms of the provisions of the **Prescription Act** of 1969 by the time the creditor got round to issuing and serving summons on the insurer. As a result Appeal Judge Maya with four other Judges of Appeal concluded that the claim had prescribed.

Although it upheld the original decision of Judge Webster in the North Gauteng High Court in Pretoria, the Appeal Court was critical that three and a half years had elapsed before the High Court delivered its judgment:

> *"Failure by judicial officers to dispose of cases speedily and efficiently cannot be countenanced as it prejudices litigants and erodes the respect and confidence of the public in the courts."*

> *"The trial judge offered no explanation for the lengthy delay in his judgment. There may well be a good reason, although I find it extremely difficult to think of one, especially in a matter which turned on a narrow question of law such as this one. Suffice it to repeat the trite saying that 'justice delayed is justice denied'. Failure by judicial officers to dispose of cases speedily and efficiently cannot be countenanced as it prejudices litigants and erodes the respect and confidence of the public in the courts."*

Van Reenen v. Santam Ltd 2013 (5) SA 595 (SCA).

Labour Law

▪ *Sweet and Sour*

"No moral system can rest solely on authority."
– A.J. Ayer (1910 - 1989)

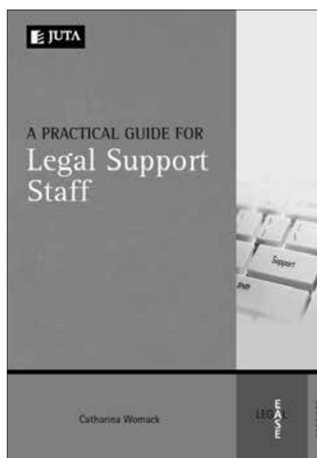
Mandla Ndlela and Michael Mkhize were unfairly dismissed by their employer Nestlé South Africa (Pty) Ltd. Their trade union, the Food and Allied Workers Union (FAWU) had, after representing them at a conciliation meeting that followed on their retrenchment, failed to refer the dispute to the Labour Court within the required 90 days or to apply for condonation.

BOOK REVIEW

A PRACTICAL GUIDE FOR LEGAL SUPPORT STAFF

By Catharina Womack
(361 pages) (Juta & Co. Ltd – www.jutalaw.co.za)

THIS LATEST publication in the user-friendly Juta Legal-Ease series will be welcomed not only by law firm management, but also by businesses who have to deal with aspects of the legal process.



Information and clear explanations of the requirements and procedures of the law are set out and primarily geared for administrative, secretarial and support staff. Readers are introduced to the mechanics of how a law firm is run, and provided with practical guidance on learning the skills to effectively and professionally comply with their responsibilities.

Separate chapters deal with the make-up of the legal profession, judiciary and court officials, criminal and civil procedure. The importance of communication, accounts, filing, record-keeping and confidentiality is emphasised. Debt collections, conveyancing and property transactions, litigation and legal instruments such as wills and affidavits are all comprehensively covered. The book contains useful examples of relevant forms, processes and documents, and legal terms are clearly defined.

Well-indexed, well-organised and well-referenced, this handbook is a resource that can be highly recommended. It bridges the gap which can exist between attorney and client, and allows the vital support staff of both law firm and client to better understand and interact with each other. Being "on the same page" has been shown to contain costs, expedite implementation, improve service delivery, and meet and exceed expectations. Congratulations are due to the author Catharina Womack, B Soc Sci LLB MBA, a practising attorney, notary, conveyancer and law lecturer.

As a result the employees instituted a high court action for damages against FAWU for failing to properly prosecute unfair dismissal claims on their behalf. Judge Swain in the KwaZulu-Natal High Court in Durban found in favour of the employees. He ordered FAWU to pay each of them damages equivalent to the compensation they would have been granted by the Labour Court had an unfair dismissal claim been pursued there.

This dispute was taken on appeal. A majority of four judges of the Supreme Court of Appeal pointed out that when it failed to refer the dispute to the Labour Court or to seek condonation for that failure, FAWU had breached its mandate to pursue an unfair dismissal claim on the employees' behalf. It did not matter that FAWU's constitution did not bind it to proceed as mandated or that it lacked legal skills. Nor could the employees' own failure to seek condonation serve as a bar to their action.

Since the dismissals were unfair, and since their claim in this regard would have been upheld by the Labour Court, they were entitled under Section 194 of the **Labour Relations Act** of 1995 to damages. Both employees had exemplary work records. Mr Ndlela had 22 years' service and Mr Mkhize 20. By comparison, the longest-serving of any other similarly placed employee was ten years. At the date of their retrenchments Mr Ndlela was 52 years old and Mr Mkhize 47 years. Given their ages and lack of formal education – standard nine in the case of the first and matric in the case of the second – it would be fair to say that neither could entertain any serious prospects of other employment. Indeed neither had been able to secure employment after their dismissal. As a result they were each given an amount equal to twelve months' salary and FAWU was ordered to pay their costs.

During the course of the appeal, FAWU raised the defence that being a trade union and not an attorney, a less exacting standard should be expected of it. This contention was dismissed by the court. When FAWU took on the mandate from its employees to represent them, it should have known that if it was not qualified to do so, that lack of skill could be damaging to the employees whose mandate it had accepted. The mandate given to FAWU was a "relatively simple one" – to take such steps as were necessary to have the employees' labour dispute with their employer determined in accordance with the provisions of the Labour Relations Act.

> *"That it could easily have done. FAWU committed breaches of its mandate. It did so in the first place by failing to timeously refer the dispute with Nestlė to the Labour Court and in the second place by failing to secure condonation for that failure. In both instances it failed to act honestly or diligently."*

Food and Allied Workers Union v. Ngcobo N.O. and Another 2013 (5) SA 378 (SCA).

The Legal Profession

■ *Duty of Confidentiality*

"Almost all of our relationships begin and most of them continue as forms of mutual exploitation, a mental or physical barter, to be terminated when one or both parties run out of goods."
– W. H. Auden (1907 - 1973)

IN A technologically connected world with instant access to vast bodies of information, it is inevitable that one finds conflict and often confusion between secrecy, privacy and confidentiality on the one hand, and transparency, access and disclosure on the other. Personal rights are often pitted against public interest. But what interests the public is not always in the public interest.

Judge Gorven presiding in the KwaZulu-Natal High Court in Pietermaritzburg recently had to rule on whether there was a conflict of interest which entitled a former client to enforce by way of an interdict a duty of confidentiality against that client's former attorney.

The judge set out the law in general dealing with fiduciary relationships which give rise to an obligation to respect the confidentiality of information received in confidence, and to refrain from using or disclosing such information otherwise than as permitted by law or by contract. This legal duty can arise from the attorney-client contract, even by way of an implied term, and it can also be applicable by way of public policy.

In order to obtain an interdict preventing a legal practitioner representing a new client against the former client, the former client would need to prove:

- confidential information was imparted or received in confidence as a result of the attorney-client relationship and the information remains confidential;

- it is relevant to the matter at hand; and

- the interests of the present client are adverse to those of the former client.

There is no ongoing fiduciary relationship or duty of loyalty owed by a legal practitioner to a former client. Any legal duty to the former client is limited to respecting confidential information acquired during the course of the attorney-client relationship. Where the former client fails to establish any of these requirements, an application for an interdict preventing the legal practitioner representing the later client against the former client must fail. As a result the application was dismissed with costs.

Wishart & Others v. Blieden N.O. & Others 2013 (6) SA 59 (KZP).

■ *Advertising*

"All advertising should be legal, decent, honest and truthful. Every advertisement should be prepared with a sense of social responsibility and should conform to the principles of fair competition as generally accepted in business. No advertisement should be such as to impair public confidence in advertising."

– The ICC International Code of Advertising Practice.

If you see or hear an advertisement that you consider to be misleading or dishonest, contact the
Advertising Standards Authority
P O Box 41555, Craighall 2014
phone 011 781 2006
fax 011 781 1616
email: *complaint@asa.org.za*
website: *www.asasa.org.za*

Law of Contract

■ *Payment of Interest*

AN IMPORTANT judgment of the Supreme Court of Appeal has dealt with the question of whether there is an obligation on a debtor to pay interest on unpaid interest. The appeal was brought by the Land and Agricultural Development Bank of South Africa against a number of commercial farmers and arose from a test case heard by Judge Prinsloo in the North Gauteng High Court in Pretoria.

The obligation to pay interest in terms of a contract may be compound interest or simple interest. Compound interest is interest on capital plus accrued interest. If compound interest is not provided for in an agreement, only simple interest on the capital will be payable in terms of the agreement.

But, so-called *mora* interest, on the other hand, is something fundamentally different. It is not payable in terms of an agreement, but constitutes compensation for loss or damage resulting from a breach of contract. When a debtor's contractual

obligation is to pay money, and he defaults by failing to pay, the general damages that flow naturally from that breach will be interest which commences running from the date of breach. Section 1(1) of the **Prescribed Rate of Interest Act** of 1975 provides that if a debt bears interest and the rate at which the interest is to be calculated is not governed by any other law or by an agreement or a trade custom or in any other manner, such interest shall be calculated at the rate prescribed under Sub-section 1(2) of the Act as at the time when such interest begins to run. That rate was prescribed by the Minister of Justice more than twenty years ago at 15.5% per annum.

"Interest is today the life-blood of finance"

Acting Judge of Appeal C H Van Der Merwe accepted that the parties may by agreement exclude liability for *mora* interest. Such agreement must be clear and unambiguous. He noted that former Chief Justice Centlivres, more than sixty years ago said that *"Interest is today the life-blood of finance"*.

The judge pointed out that there is no principle that stands in the way of a finding that in the absence of agreement, a creditor should be compensated by an award of *mora* interest on unpaid interest for the loss or damage suffered as a result of not receiving the agreed interest on time. It must be assumed that the interest would have been productively employed had it been paid on the due date. No consideration of policy points the other way. On the contrary, taking into account that interest is the "life-blood of finance", it is in the public interest that creditors be compensated when debtors fail to make payment of agreed interest on the due date.

Land and Agricultural Development Bank of South Africa v. Ryton Estates (Pty) Ltd and Others [2013] 4 All SA 385 (SCA).

■ *Two Late for Tears*

"My son, if you be surety for your friend,
If you have stricken your hand with a stranger,
You are snared with the words of your mouth,
You are taken with the words of your mouth."
– Old Testament, Proverbs 6:1-2

RMB PRIVATE Bank brought an application in the South Gauteng High Court in Johannesburg before Judge Kathy Satchwell for judgment in the sum of R1 470 277 against two sureties, a mother and daughter. The daughter claimed that her mother Mrs Parkinson had "no recollection of having signed" the suretyship agreement and, if she did, "she did not appreciate the significance of her actions in doing so." All Mrs Parkinson intended to do was "to provide a limited amount of assistance to me as her daughter" and she intended the signed documentation to "make herself a joint or second signatory" on the credit facility being applied for. Mrs Parkinson signed the documents "without reading them or appreciating their significance."

Judge Satchwell said this was *"a curious set of averments."* Neither Mrs Parkinson nor her daughter claimed that any employee of the bank made any wrongful or untruthful representations to Mrs Parkinson which induced her to sign the suretyship. She merely claimed that she signed without reading the document. *"She relies upon her own mistakes."*

Mrs Parkinson was not a person with no experience of the world, nor a disabled and very senior citizen. At the time of signing the suretyship agreements she was 59 years old. She must have known that her daughter was borrowing money from the bank and that her daughter was required to both furnish a suretyship and mortgage her immovable property. She must have approached her mother to provide the additional suretyship. The daughter did not state in her answering affidavit that she deceived her mother, concealed the need for the suretyship or misled her mother as to the nature of the document which she was signing. She states that she was present when her mother signed the documents. The judge remarked: *"I can appreciate that Parkinson had no interest in her daughter's business but she certainly had an interest in her daughter."*

South Gauteng High Court, Johannesburg

The judge pointed out that the documentation made it clear that it was a "SURETYSHIP". Immediately above Parkinson's signature was the word "surety" which could not have been missed because she placed her signature in the space provided. Immediately below her identity number which was filled in are the words "the surety".

Judge Satchwell concluded that the documentation signed was neither misleading nor deceptive. It clearly proclaimed what it was and it clearly identified to the signatory what role she would assume. As a result judgment was granted in favour of the bank jointly and severally against both the daughter and the mother for the full amount claimed together with interest and costs.

RMB Private Bank (a division of FirstRand Bank Ltd) v. Kaydeez Therapies CC (in liquidation) and Others 2013 (6) SA 308 (GSJ).

Banking

■ *Out of Control*

"It is impossible for a man to be cheated by any one but himself."
– Ralph Waldo Emerson (1803-1882)

JUDGE ERIC LEACH in the Supreme Court of Appeal recently delivered an important judgment dealing with the criminal conviction of the executive director of Regal Bank and its holding company and the sentences imposed in respect of those convictions. Judge Leach noted with concern that the record showed the appellant *"to be an arrogant individual who at no stage during the lengthy trial displayed any insight into the wrongfulness of his actions. Instead he systematically insulted, belittled and defamed various witnesses who were called to testify against him, including accusations of corruption and perjury. He showed no sign of remorse and it needs to be forcefully brought home to him that his actions were unacceptable."*

Judge Leach observed: *"Those responsible for the financial statements of public companies are under an onerous obligation to ensure that their financial results placed in the public domain are accurate so that shareholders, both actual and potential, are not misled about the financial health of the company. That is all the more so where, as here, the company carries on business as a bank which seeks to attract custom and deposits from the general public at large.*

In considering an appropriate sentence the court had regard to the views of former Chief Justice Michael Corbett in a 1975 case where he stated:

> *"A judicial officer should not approach punishment in a spirit of anger because, being human, that will make it difficult for him to achieve that delicate balance between the crime, the criminal and the interests of society which his task and the objects of punishment demand of him. Nor should he strive after severity; nor on the other hand, surrender to misplaced pity. While not flinching from firmness, where firmness is called for, he should approach his tasks with a humane and compassionate understanding of human frailties and the pressures of society which contribute to criminality."*

Levenstein v. S [2013] 4 All SA 528 (SCA).

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